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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 1116

WALTER C. DeFRATES,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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NO.

WALTER C. DeFRATES,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, Walter C. DeFrates, respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of Illinois.

Statement of the Matter Involved.

This is a criminal action initiated in the Criminal Court of Cook County, Illinois, against the petitioner who was indicted for the crimes of rape and crime against nature.

The indictment (Rec. 7) was in two counts as follows:

Count 1 charges: "That Walter C. DeFrates did unlawfully and feloniously make an assault upon one Eacie McCoy and then and there feloniously and forcibly did ravish and carnally know the said Eacie McCoy against her will".

Count 2 charges: "The Grand Jurors do further present that one Walter C. DeFrates on the 8th day of October, 1945 committed an infamous crime against nature upon and with one Eacie McCoy".

There were two trials for the same alleged offenses. Trial was by jury and after three days of testimony in the first trial the jury adjourned to the jury room to deliberate upon its verdict. After less than forty-five minutes of deliberation the trial judge ordered the jury back into the court room where the following proceedings were had (Rec. 12):

"The Court: 'Bring in the jury.' Whereupon the jury returned to the court room.

The Court: 'Will the foreman of the jury please rise?' (The foreman rises.)

The Court: 'The foreman will answer this question, yes or no. Has the jury been able to arrive at a verdict?'

Foreman: 'Just about.'

The Court: 'Answer the question yes or no.'

Foreman: 'No.'

The Court: 'Let the record show that the jury has been unable to arrive at a verdict and is discharged from any further duty in this case.'

Mr. Power: 'I would like to have the record show that the jury retired to deliberate on its verdict in this

case at five minutes to three and that it is now twenty minutes to four.'

The Court: 'Very well.' "

The discharge of the jury was on the 30th day of January, 1946 (Rec. 13) and petitioner was forced to stand trial on February 5th, 1946 the second time upon the same indictment (Rec. 11). Before the second trial, petitioner filed a written plea in bar setting forth the proceedings at the first trial relative to the premature discharge of the jury and pleading that to again be forced to trial would be in violation of the 5th amendment to the U. S. Constitution (Rec. 13) and praying for his discharge. The plea was denied and the second trial ended in a verdict of guilty on both counts.

The only evidence introduced in support of the 2nd count of the indictment was that petitioner forced the prosecutrix to commit penetration *per os* despite the fact that such act is not alleged in the indictment and is neither at common law nor by statute in Illinois included in the crime of crime against nature.

On the 15th day of February, 1946 at the second trial petitioner was sentenced on the first count to one year in the penitentiary and on the second count to nine to ten years (Rec. 74) from which judgment he appealed directly to the Supreme Court of Illinois where the judgment was affirmed and a petition for re-hearing was denied on the 20th day of January, 1947 (Rec. 100).

Two questions were involved which petitioner contends were decided in violation of his constitutional rights under the fifth and fourteenth amendments to the Federal Constitution.

The first contention is that the compulsion of petitioner to stand trial the second time after the premature discharge of the jury at the first trial without his consent constituted double jeopardy and the second is that the second count of the indictment which simply charged petitioner had committed the crime of crime against nature without further clarification abridged the petitioner's liberty without due process of law and particularly where the only evidence introduced at the trial was of penetration *per os* which neither at common law nor by statute in Illinois is embraced in the crime of crime against nature so that such count was insufficient to inform petitioner of the nature and cause of the accusation against him.

Petitioner raised the double jeopardy defense by a written plea in bar to the second trial (Rec. 13) which plea was denied and by a motion for new trial (Rec. 73) and raised the second question of the abridgment of due process of law by a motion to quash the indictment (Rec. 8) which motion was also denied (Rec. 8), by a motion in arrest of judgment (Rec. 73) and by a motion for new trial (Rec. 72) as well as in the first briefs filed in the Supreme Court of Illinois.

The matter involved in this case then is (1) does the discharge of the jury after less than forty-five minutes of deliberation in a trial which required more than three days to try and where there was no manifest necessity therefor or the ends of public justice did not require it, violate the double jeopardy clause of the 5th Amendment; and (2) does an indictment which simply charges defendant with a crime which has no definite meaning either at common law or by statute and where the act proven is not included in the common law definition thereof, violate the due process of law provisions of the 5th and the 11th Amendments to the Federal Constitution?

This Court has jurisdiction.

The Federal constitutional issues are properly preserved. Petitioner preserved the Federal constitutional questions as to both the discharge of the jury before verdict at the first trial where there was neither manifest necessity therefor nor where the ends of public justice did not require it by a plea in bar (Rec. 13) and the abridgment of the due process of law provision of the constitution due to the insufficiency of the 2nd count of the indictment, by a motion to quash (Rec. 8), a motion in arrest of judgment (Rec. 73), a motion for new trial (Rec. 72) and by briefs filed in the Supreme Court of Illinois. Illinois decisions hold the insufficiency of an indictment may be raised at any time, even as late as in the reply briefs filed in the Supreme Court.

People v. *Minto*, 318 Ill. 293, 149 N. E. 241.
People v. *Wallace*, 316 Ill. 120, 146 N. E. 486.

The Supreme Court of Illinois in its decision in this case said:

> "It has long been recognized by this Court and elsewhere that a court of justice is invested with the authority to discharge a jury from giving any verdict whenever, in the court's opinion, there is manifest necessity for such act or the ends of public justice would otherwise be defeated, and that such is within the discretion of the trial court and is not subject to review in the absence of abuse of discretion. (*People* v. *Simos*, 345 Ill. 226; *People* v. *Peplos*, 340 Ill. 27; *Dreyer* v. *People*, 188 Ill. 40; *United States* v. *Perez*, 9 Wheat. 579; *Simmons* v. *United States*, 142 U. S. 148)" (Rec. 82).

The wording of the opinion is similar to the phraseology used by the court in *United States* v. *Perez*, 9 Wheat. 579, one of the cases cited so that while the opinion does not

specifically refer to the abridgment of petitioner's rights under the Federal Constitution the citation to the United States Supreme Court decision and the use of its phraseology indicates that the court was fully aware of petitioner's rights under the Federal Constitution and that its decision adjudicated those rights. In all events the decision had the effect of denying petitioner the immunities guaranteed him under the Federal Constitution. The denial of the petition for rehearing by the Supreme Court of Illinois is a final judgment by the highest court in the state in which decision could be rendered so that all remedies in the state court have been exhausted.

This court has granted a writ of certiorari to a state supreme court where petitioner has been deprived of his liberty without due process of law.

Smith v. *O'Grady, etc.*, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859.

Ward v. *State of Texas*, 316 U. S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663.

Also the writ of certiorari has been granted where a plea of double jeopardy has been denied in a State court because of the discharge of a jury before verdict at a former trial.

Dreyer v. *Illinois*, 187 U. S. 86, 23 S. Ct. 28, 47 L. Ed. 79.

Robertson v. *Baldwin*, 165 U. S. 281, 17 S. Ct. 326, 41 L. Ed. 715.

This court has jurisdiction to grant the writ of certiorari under Section 237 of the Judicial Code, as amended (28 U. S. Code Ann. 344(b)).

Bohanan v. *Nebraska*, 118 U. S. 231, 6 S. Ct. 1049, 30 L. Ed. 71.

Hansberry v. *Lee*, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22.

A petition for rehearing was denied by the Supreme Court of the State of Illinois and the judgment thus became final on the 20th day of January, 1947 (Rec. 100).

The Questions Presented.

The questions presented to this court are (1) Whether in a criminal case the discharge of a jury before verdict, where there was neither manifest necessity therefor nor where the ends of public justice did not require it and the compulsion of petitioner to stand trial the second time for the same offense, constituted double jeopardy in violation of the 5th amendment to the Federal Constitution; and (2) whether judgment on a count in an indictment which accused petitioner only of committing the crime of crime against nature when that crime was neither defined in the statutes of the State of Illinois nor has a definite meaning at common law and where the subsequent proof related only to the crime of penetration *per os* which was not at common law a part of the crime of the crime against nature, constituted abridgment of the due process of law clauses of the 5th and 14th amendments to the Federal Constitution.

Reasons For Allowance of Writ.

The Supreme Court of Illinois did not follow the precedent of the U. S. Supreme Court and of other federal courts and state courts of other jurisdictions in its determination of the questions presented under the Federal Constitution.

Although the Illinois Supreme Court cited the case of *U. S.* v. *Perez*, 9 Wheat. 579, 6 L. Ed. 165, the circumstances there were so different from those involved in petitioner's case that it was neither proper precedent nor was what was said therein properly followed by the Illinois Supreme Court in its decision. The U. S. Supreme Court in that

case said relative to the court's power to discharge a jury before verdict that "the power ought to be used with the greatest caution under urgent circumstances, for very plain and obvious causes" and further that a court is invested with authority to discharge a jury only where "taking all the circumstances into consideration there is a manifest necessity for the act or the ends of public justice would otherwise be defeated".

Petitioner's first trial lasted more than three days. The jury had been deliberating on the verdict less than forty-five minutes when the trial judge called in the jury and requested the foreman to answer "yes" or "no" to the question of whether the jury had been able to reach a verdict. The foreman answered "just about". The court again demanded he answer the question "yes" or "no". The foreman then answered "no" and the court said: "Let the record show that the jury has been unable to arrive at a verdict and is discharged from any further duty in this case." (Rec. 12). Thus the dictum in *U. S.* v. *Perez* was flagrantly disregarded by the trial judge who did not use his power to discharge the jury before verdict "with the greatest caution under urgent circumstances, for very plain and obvious causes". The record by the court's own finding affirmatively showed there was no "manifest necessity for the act" or that the "ends of public justice would otherwise be defeated" except for the discharge of the jury. The jury foreman who was in a better position to know than was the trial judge had stated the jury was "just about" to arrive at the verdict.

In the case of *Cornero* v. *U. S.*, 48 Fed. (2d) 69, the Ninth Circuit Court of Appeals sustained a plea of double jeopardy where the jury had been discharged before verdict

in a prior trial for the same offense and exhaustively considered the U. S. Supreme Court cases on the point.

It is well established at common law that penetration *per os* did not constitute the crime of crime against nature. *State* v. *Wellman*, 253 Mo. 302, 161 S. W. 795; *Rex* v. *Jacobs*, R. & R. 331, 168 Reprint 830; *Kelly* v. *People*, 192 Ill. 119, 61 N. E. 425. The only three provisions of the Illinois Statutes which refer to the crime of crime against nature are as follows:

> "Every person convicted of the crime of * * * sodomy or other crime against nature * * * shall be deemed infamous".
>
> Sec. 7 of the Ill. Criminal Code, Chap. 38 Smith-Hurd Ill. Anno. Statutes, Sec. 587.

The second one provides:

> "The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term of not less than one year and not more than ten years".
>
> Sec. 47 of the Ill. Criminal Code, Chap. 38 Smith-Hurd Ill. Anno. Statutes, Sec. 141.

And the third one reads:

> "It shall not be necessary to prove emission, to convict any person of the crime against nature".
>
> Sec. 48 of the Ill. Criminal Code, Chap. 38 Smith-Hurd Ill. Anno. Statutes, Sec. 142.

Inasmuch as the Illinois Statutes then do not define the crime and petitioner was convicted of penetration *per os* which is not a part of the crime of crime against nature and the indictment charged petitioner only of having committed such crime, petitioner was convicted in violation of the due process of law provisions of the 5th and 14th amendments to the Federal Constitution. He was not in-

formed of the charge against him and he was convicted of a crime not embraced in the charge in the indictment.

The highest court in the State of Missouri in an identical situation (*State* v. *Wellman*, 253 Mo. 302, 161 S. W. 795) reached the opposite conclusion from that of the Supreme Court of Illinois in this case and this question has not been passed upon by this court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Illinois Supreme Court, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Illinois Supreme Court had in the case numbered and entitled on its docket, No. 29652, People of the State of Illinois, Defendant in Error, *vs.* Walter C. DeFrates, Plaintiff in Error, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Illinois Supreme Court be reversed by the Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

HAROLD V. SNYDER,
Attorney for Petitioner.

Dated February, 1947.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Illinois Supreme Court.

The opinion of the Supreme Court of Illinois is presented in full in the Record (Rec. 78-84) and is reported in the North Eastern, Reporter System 70 N. E. 2d 591.

II.

Jurisdiction.

1. The date the opinion was rendered in the Supreme Court of Illinois was November 20th, 1946 and the petition for rehearing was denied by said court on January 20th, 1947 (Rec. 100).

2. The statutory provision which is believed to sustain the jurisdiction of this court is section 237 of the Judicial Code, as amended (28 U. S. Code Ann. 344 (b)).

3. The Federal constitutional issues which have been preserved were decided by the Supreme Court of Illinois in a manner which petitioner contends abridges his rights under the 5th and 14th amendments to the U. S. Constitution as set forth more fully in the petition, *supra*, pages 5 to 7 inclusive.

4. The cases believed to sustain said jurisdiction are as follows:

Smith v. *O'Grady, etc.*, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859.

Ward v. *State of Texas*, 316 U. S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663.

Dreyer v. *Illinois*, 187 U. S. 86, 23 S. Ct. 28, 47 L. Ed. 79.

Robertson v. *Baldwin*, 165 U. S. 281, 17 S. Ct. 326, 41 L. Ed. 715.

Bohanan v. *Nebraska*, 118 U. S. 231, 6 S. Ct. 1049, 30 L. Ed. 71.

Hansberry v. *Lee*, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22.

III.

Statement of the Case.

Two issues preserved throughout the case are presented in the petition.

a

The first concerns the point of whether the discharge of a jury before verdict without any necessity therefor constitutes a bar to a subsequent trial for the same offense.

This issue arose at the first trial of petitioner in the Criminal Court of Cook County Illinois. After three days of trial, the jury, having had less than 45 minutes of deliberation, was recalled by the trial judge, and the foreman was asked to answer by "yes" or "no" the question of whether the jury had been able to arrive at a verdict. He answered "just about" but was again ordered by the trial judge to answer "yes" or "no", whereupon he answered "no". The judge then said "Let the record show that the jury has been unable to arrive at a verdict and is discharged from any further duty in this case." Mr. Power, petitioner's trial attorney, stated: "I would like to have the record show that the jury retired to deliberate on its verdict in this case at five minutes to three and that it is now twenty minutes to four." The Court answered: "Very well."

These proceedings were pleaded in bar to the second suit as constituting double jeopardy (Rec. 13).

b

The second concerns the sufficiency of the second count of the indictment and the subsequent conviction of petitioner for a crime different than that embraced in such count and whether that constitutes a conviction of petitioner without due process of law.

The second count[1] of the indictment accused petitioner of committing the infamous crime of crime against nature, yet the testimony was an attempt to prove that petitioner forced the prosecutrix to commit an act of penetration *per os*. Inasmuch as the latter is not at common law nor by statute in Illinois embraced in the crime of crime against nature, petitioner was never indicted for the crime for which he was convicted.

IV.

Specification of Errors.

The Supreme Court of Illinois erred in not reversing the Criminal Court of Cook County. It erred in not holding that the plea in bar to the second trial should have been sustained because the premature discharge of the jury at the first trial constituted double jeopardy. The court erred in not holding that the second count of the indictment was insufficient to inform the petitioner of that for which he stood accused and therefore violated the due process clause of the 5th and 14th amendments to the Federal Constitution.

---

1 The indictment was in two counts, the first one charging rape. Petitioner was sentenced to one year on this charge and to nine to ten on the 2nd count under consideration. A reversal on this point would of course relieve petitioner only of the sentence on count 2. A reversal on the double jeopardy point would affect both counts.

V.

ARGUMENT

Summary of the Argument.

POINT A.

The Illinois Supreme Court disregarded the well established principle that the discharge of a jury before verdict constituted a bar to further prosecution for the same offense.

POINT B.

The Illinois Supreme Court misapplied the rule that the discharge of a jury before verdict violates the double jeopardy clause of the Federal Constitution unless the power of a trial judge to discharge was "used with the greatest caution, under urgent circumstances, and for very plain and obvious causes".

POINT C.

The Illinois Supreme Court has by its decision abrogated the well founded rule that the discharge of a jury before verdict constitutes jeopardy unless there is a manifest necessity for the act or the ends of public justice require it.

POINT D.

There is a clash in legal principles which has not been settled by this Court; one principle holding that a jury may be discharged before verdict only for manifest necessity and plain and obvious causes; the other, espoused by the Illinois Supreme Court, holding that a trial judge's

decision in discharging the jury will not be disturbed by a reviewing court unless the abuse of discretion is shown in the record.

Point E.

The Illinois Supreme Court's decision holding the 2nd count of the indictment valid not only violated the due process clause of the 5th and 14th amendments to the Federal Constitution which require that a defendant be informed of that for which he stands accused, but is contrary to the interpretation given to those provisions in other jurisdictions.

A. The Illinois Supreme Court disregarded the well established principle that the discharge of a jury before verdict constituted a bar to further prosecution for the same offense.

The Illinois Supreme Court used the very wording used by this court in *U. S.* v. *Perez*, 9 Wheat. 579, 6 L. Ed. 165 in its opinion that a trial court is invested with the power to discharge a jury before verdict whenever "there is a manifest necessity for the act or the ends of public justice would otherwise be defeated".

The court then negatives the entire effect of the rule by holding that the record must show an abuse of discretion. Although the record does show an abuse of discretion because the trial judge stated the "jury was unable to arrive at a verdict" in contradiction to the jury foreman's statement that it was "just about" to arrive at one, so far as this petition for certiorari is concerned, that is not so important as the Illinois court's failure to follow the U. S. Supreme Court and its use of the latter's words to arrive at a conclusion opposite from that intended.

Its conclusion is likewise opposed *inter alia* to that in the following cases:

U. S. v. *Kraut*, 2 Fed. Supp. 16.
People v. *Warden City Prison*, 202 N. Y. 138, 95 N. E. 729.
State v. *St. Clair*, 42 La. Ann. 755, 7 S. 713.
People v. *Cage*, 48 Cal. 323, 17 Am. Rep. 436.
Commonwealth v. *Gray*, 249 Ky. 36, 60 S. W. (2d) 133.
People v. *Barr*, 248 N. Y. 126, 161 N. E. 444.
Love v. *State*, 41 Okla. Cr. 291, 272 P. 1035.
State v. *Grayson*, 23 So. (2d) 484 (Fla.).

And in 22 Corpus Juris Secundum it is said at page 399, section 260:

"The improper discharge of a jury after they have retired to consider their verdict, but before agreeing on one, is equivalent to an acquittal."

B. The Illinois Supreme Court misapplied the Rule that the discharge of a jury before verdict violates the double jeopardy clause of the Federal Constitution unless the power of a trial judge to discharge was "used with the greatest caution, under urgent circumstances, and for very plain and obvious causes".

The Illinois Supreme Court relied for authority on the case of *United States* v. *Perez*, 9 Wheat. 579, 6 L. Ed. 165. The Court said in that case relative to the power of a court to discharge a jury before verdict that such power "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes".

It seems apparent that if a court should exercise its power the reason for the discharge to be "plain and obvious" should appear in the record. Certainly it is not

encumbent upon the defendant to negative the fact that the court exercised its power only with the greatest caution and for very plain and obvious causes. That would be an impossible burden of proof for it would mean interpreting what went on in the mind of the court. The only construction that could reasonably be given to this court's dictum in *U. S.* v. *Perez* is that the reason for the discharge in order for it to be such a discharge as would not constitute a bar to further prosecution for the same offense must appear in the record. Otherwise the cause would not be "plain and obvious". That opinion further emphasized the point by stating there must be a "*manifest* necessity for the act".

The Illinois Supreme Court utterly failed to apply the principles of the very case it relied on. Its opinion recites:

> "It is apparent the court acted rather hastily but we hardly see how the record justifies the assertion that the trial court abused its discretion in the premises, nothing appearing to show such abuse. A court of review will not presume an abuse of discretion. It has long been recognized by this court and elsewhere that a court of justice is invested with the authority to discharge a jury from giving any verdict whenever, in the court's opinion, there is manifest necessity for such act or the ends of public justice would otherwise be defeated, and that such is within the discretion of the trial court and is not subject to review in the absence of abuse of discretion." (Rec. 82, 2).

The Court's statement was inaccurate in fact as well as in law for the trial judge in dismissing the jury said "Let the record show that the jury has been unable to arrive at a verdict." This findings was made despite the statement of the jury foreman who was in a much better position to know than was the trial judge that the jury was "just about" to arrive at one.

Even though the record itself affirmatively showed abuse of discretion the more serious result of the Illinois Supreme Court's opinion is its complete reversal of the interpretation of the U. S. Supreme and other Federal Courts' long standing legal principle that the discharge before verdict may be only for plain and obvious reasons and where there is manifest necessity therefore.

Cornero v. *United States*, 48 Fed. (2d) 69.

U. S. v. *Kraut*, 2 Fed. Supp. 16.

People v. *Warden City Prison*, 202 N. Y. 138, 95 N. E. 729.

C. The Illinois Supreme Court has by its decision abrogated the well founded rule that the discharge of a jury before verdict constitutes jeopardy unless there is a manifest necessity for the act or the ends of public justice require it.

Inasmuch as the record affirmatively showed a clear abuse of discretion in the premature discharge of the jury there could scarcely be a case where such discharge would constitute jeopardy unless here but despite that fact when the Illinois Supreme Court held that "a court of review will not presume an abuse of discretion" it virtually abrogated the rule that such discharge constitutes jeopardy.

It cannot be proven that all reasons for a judge's opinion have been excluded. It would be impossible to refute that there was no abuse of discretion if a judge did not give a reason or gave an erroneous one for the discharge as in this case. Thus if it is necessary as this court has found that there must be manifest necessity for the discharge or the reasons must be plain and obvious then the Illinois Supreme Court's statement that an abuse of discretion will not be presumed is wrong. The establishment of the Illinois court's position would forever abolish the jeopardy rule on premature discharge for it would render proof of abuse of

discretion a *sine qua non* and a taciturn judge who discharged the jury from mere caprice could abridge the constitutional rights of a defendant by his mere silence. Thus to make the rule effective an abuse of discretion often must be presumed. In fact it would always be presumed unless the contrary was shown.

In the case of *Cornero* v. *United States*, 48 F. (2d) 69 the Circuit Court of Appeals for the ninth circut reversed a conviction where the defendant has been denied a plea of double jeopardy for the discharge of a jury before verdict at the first trial and the government had relied upon there being an exception to the double jeopardy rule allowing such discharge under urgent necessity for the purposes of justice. The Court said at page 71:

> "It is true that there is language used by the courts * * * which divorced from its context and applied as authority for the general proposition, would sustain the rule advocated by the government in the case at bar. We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice."

D. There is a clash in legal principles which has not been settled by this Court; one principle holding that a jury may be discharged before verdict only for manifest necessity and plain and obvious causes; the other, espoused by the Illinois Supreme Court, holding that a trial judge's decision in discharging the jury will not be disturbed by a reviewing court unless the abuse of discretion is shown in the record.

An absence in the record of any showing of necessity or cause for the discharge of a jury before verdict would, if the Illinois Supreme Court opinion is allowed to stand, be precedent for forever precluding the jeopardy rule that

such discharge may be valid only where there is manifest necessity or there are plain and obvious causes therefor. There is obviously a conflict in the two principles. To make the prevention of double jeopardy rule workable the statements that the discharge "is within the discretion of the trial court and is not subject to review in the absence of abuse of discretion"[1] and that "a court of review will not presume an abuse of discretion" must be modified by some qualifying rule for they cannot be reconciled with the requirement that there be a manifest necessity for the discharge.

This qualifying rule may be found in the words of the U. S. Circuit Court of Appeals, Third Circuit, in the case of *United States* v. *White*, 147 Fed. 2d 603, that:

> "The action of the court in refusing to grant the privilege is accordingly not reviewable on appeal except possibly for arbitrary or capricious action on the part of the District Judge *which amounts to an abuse of discretion.*" (Italics supplied)

Such wording presents a solution to two otherwise irreconcilable legal statements. Thus no abuse of discretion would be presumed except where as in this case the trial judge acted so capriciously and arbitrarily that his action amounted to an abuse of discretion.

The rule that a reviewing court will not presume an abuse of discretion must yield to a rule which will afford to a defendant his substantial rights. Otherwise, as was amply demonstrated by the Illinois Supreme Court decision in this case, the defendant's constitutional rights are abridged by an arbitrary rule having no constitutional or fundamental origin. A rule of procedure has been allowed precedence over a law of substance.

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[1] Quoted from the Illinois Supreme Court's opinion (Rec. 82).

E. The Illinois Supreme Court's decision holding the 2nd count of the indictment valid not only violated the due process clause of the 5th and 14th amendments to the Federal Constitution which require that a defendant be informed of that for which he stands accused, but is contrary to the interpretation given to those provisions in other jurisdictions.

The 2nd count of the indictment stated only:

> "The Grand Jurors do further present that one Walter C. DeFrates on the 8th day of October, 1945 committed an infamous crime against nature upon and with one Eacie McCoy". (Rec. 7)

The Illinois Supreme Court took the position that this was sufficient because it was "drawn in the language of the statute" (Rec. 82). The statutes of the State of Illinois, however, do not define the crime.[3]

The deficiency becomes more flagrant when it is apparent that neither the indictment nor the statute define the crime of crime against nature and that penetration *per os* which was the crime for which petitioner was convicted, is at common law excluded from such crime.

58 Corpus Juris 789, Sec. 4.

Kelly v. *People*, 192 Ill. 119, 61 N. E. 425.

Rex v. *Jacobs*, R. & R. 331, 168 Reprint 830.

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[3] The only provisions are:

"Every person convicted of the crime of * * * sodomy or other crime against nature * * * shall be deemed infamous * * *".

Sec. 587, Ill. Criminal Code, Chap, 38 Smith-Hurd Ill. Anno. Statutes, Sec. 587.

The second one provides:

"The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term of not less than one year and not more than ten years".

Sec. 47 of the Ill. Criminal Code, Chap. 38 Smith-Hurd Illinois Anno. Statutes, Sec. 141.

And the third one reads:

"It shall not be necessary to prove emission, to convict any person of the crime against nature".

Sec. 48 of the Ill. Criminal Code; Chap. 38 Smith-Hurd Ill. Anno. Statutes, Sec. 142.

People v. *Schmitt*, 275 Mich. 575, 267 N. W. 741.
State v. *Wellman*, 253 Mo. 302, 161 S. W. 795.
Kinnon v. *State*, 86 Neb. 234, 125 N. W. 594.
Prindle v. *State*, 31 Tex. Crim. Rep. 551, 21 S. W. 360.
Wise v. *Com.*, 135 Va. 757, 115 S. E. 508.
People v. *Boyle*, 116 Cal. 658, 48 Pac. 800.
Commonwealth v. *Poindexter*, 133 Ky. 720, 118 S. W. 943.
State v. *Murry*, 136 La. 253, 66 So. 963.
Munoz v. *State*, 103 Tex. C. R. 439, 281 S. W. 857.

In 22 Corpus Juris Secundum, page 69, Sec. 21, it is said:

> • • • "When a statute punishes an act giving it a name known to the common law, without otherwise defining it, the statute is construed according to the common-law definition".

The text is supported by a long list of cases and the rule of law is applicable as well in the federal courts.

U. S. v. *Brandenburg*, 144 Fed. 2d 656, 659 (C. C. A. 3).

It is a familiar rule of construction that when statutes use words which have a definite meaning at common law it will be presumed that the terms are used in the sense that they were understood at common law.

50 Amer. Jurisprudence, 266, Sec. 279.

The Illinois Statutes do not define crime against nature so that resort must be had to the common-law definition to prove and to determine what the crime embraces. The common-law definition as has been shown does not embrace the act of penetration *per os*.

In the case of *State* v. *Wellman*, 253 Mo. 302, 161 S. W. 795, the same question was considered and the Court there said at page 312 (page 798 of 161 S. W.):

"It is to be regretted that the public records of our State should be contaminated with the details of such loathsome crimes; but it is difficult for the writer to bring himself to understand how section 22, Art. 2, Constitution of Missouri, prescribing that the accused may demand the 'nature and cause of the accusation against him', can be materially modified or suspended."

The theory of suppression of a definition of a crime because of its repugnancy might be more understandable if the Court recognized the State Legislature's reluctance in giving verbal expression to it but *pro tanto* required the indictment to describe the nature of the act in more detail than would be required if the Statute itself had shed some light on the nature of the crime.

Conclusion.

The discharge of the jury after only forty-five minutes of deliberation with the declaration by the trial judge that the jury was unable to agree showed a capricious and arbitrary act on the part of the judge as to constitute an abuse of discretion. The effect of the Illinois Supreme Court's opinion is virtually to abolish the substantive law that the premature discharge of a jury without necessity constitutes jeopardy and is violative of the provisions of the 5th amendment to the U. S. Constitution. Even if the Illinois Supreme Court were correct which it was not, in stating that the record did not show an abuse of discretion, it has, by so holding, made a rule of procedure paramount to a constitutional and fundamental right.

The Illinois Supreme Court's insouciance to the provisions of the 5th and 14th amendments to the Federal Constitution is further emphasized by its failure to require the indictment to inform the defendant of that for which he stands accused and of permitting a defendant to be convicted of a crime which was not made a crime by statute and is not embraced within the crime specified in the indictment.

Respectfully submitted,

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